Supreme Court, U.S.
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No. 92-1340

In The

Supreme Court of the United States

October Term, 1992

NORMAN PERLMUTTER,

Petitioner,

vs.

KATHRYN PERLMUTTER,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the concept of due process demand that a litigant be allowed initially to raise the issue of pervasive judicial bias and prejudice in his Appellant's Brief, when the alleged evidence of the bias "unambiguously" emerges at the end of post-trial proceedings and the litigant elects not to raise the issue before the trial court in a post-trial motior because an Illinois Supreme Court Rule makes such a motion optional?

2. Does a series of adverse rulings following a hearing on the issue of sanctions for various trial and pre-trial actions by a litigant amount to proof of judicial bias and prejudice, when the trial proceedings were admittedly conducted with courtesy and fairness?

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No. 92-1340

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NORMAN PERLMUTTER,

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On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Kathryn Perlmutter, respectfully requests that this Court deny the Petition for Writ of Certiorari that seeks review of one portion of the opinion issued by the Illinois Appellate Court, Second District. That opinion is reported at 225 Ill. App. 3d 362, 587 N.E. 2d 609.

STATEMENT OF THE CASE

On October 21, 1987 Kathryn Perlmutter filed a petition in the Circuit Court of Lake County, Illinois to dissolve her 9-1/2 year

marriage to Norman Perlmutter. At the time, Norman Perlmutter was the CEO of Heitman Financial, Ltd., a commercial real estate corporation that identifies, purchases, manages and ultimately sells commercial real estate on behalf of its advisory clients, including insurance companies, pension funds, tax exempt funds and similar entities. Heitman has several offices nationwide and manages a portfolio valued at approximately $5.6 billion (P.X. 213). Both parties had accumulated significant personal estates prior to the marriage; as originally determined by the trial court, Mrs. Perlmutter owned $2,309,799 in stock proceeds, while Mr. Perlmutter owned $4,153,270 in business interests, real estate, personal property and various investments. The value of their marital estate was ultimately found to be $18,031,611 (App. 4-6), of which Mrs. Perlmutter was awarded $3,350,000 in real estate, $1,371,263 in bank and investment accounts and other personalty, and $2,451,000 in cash from Mr. Perlmutter, for a total of $7,172,263.

After the court had issued its memorandum opinion, and while Mrs. Perlmutter's counsel were preparing the written judgment, both her present and former attorneys filed Motions for Clarification raising, *inter alia*, the issue of attorneys' fees; the court had omitted any mention of fees in its Opinion Letter (Resp. App. *infra*, 1a). Mrs. Perlmutter's former attorneys had already filed a fee petition, and the Schiller firm's motion sought fees for conduct by Mr. Perlmutter and his attorneys during the discovery process (C. 2794).

During pre-trial and trial proceedings, each firm had already secured rulings finding certain conduct of Mr. Perlmutter's to be sanctionable, although no penalties had yet been imposed: On October 11, 1988 the court held sanctionable Mr. Perlmutter's pursuit and last-minute abandonment of a change of venue to another county, in violation of Ill. Rev. Stat. 1987, ch. 110, § 2-611 (Resp. App. 11a, C. 837, 843); also sanctionable was the refusal of

one of Mr. Perlmutter's witnesses to answer questions and turn over documents (C. 2278) and his last minute injection into the proceedings of issues involving the parties' older child, which had been resolved earlier by the parties' Joint Parenting Agreement (C. 578).

On September 11, 1990, during argument on the Motions for Clarification, after both firms had pointed out the omission of fees and the Schiller firm noted its intent to seek an award of attorneys' fees for several abuses of discovery by Mr. Perlmutter and his attorneys (C. 2794), the court responded that it had not mentioned fees in its written findings and decision but would entertain any fee petitions filed (Resp. App. 2a). Upon entry of the Judgment of Dissolution of Marriage on September 12, 1990, the court, under the authority of Ill. Rev. Stat. 1989, ch. 110, § 2-1303 (Resp. App. 12a) also ordered judgment interest to accrue on the award of cash Mr. Perlmutter was to pay to Mrs. Perlmutter (C. 2840).

The court and counsel also discussed at length whether the judgment was final, enforceable and appealable. After the judgment was entered Mrs. Perlmutter's attorneys had begun collection proceedings; Mr. Perlmutter's counsel requested and was granted leave to file a Petition for Rehearing and to Vacate a portion of the judgment under Ill. Rev. Stat. 1989, ch. 110, § 2-1203, the effect of which was to stay enforcement of the judgment. The court and counsel also concluded that the judgment was presently not appealable because of the outstanding fee petition by Mrs. Perlmutter's prior attorney; however, the court noted, the interest issue was the "kicker" because interest would accrue on the final judgment from the day of its entry, September 12, 1990 (R. 5228-29; C. 2840).

On October 10, 1990 both of Mrs. Perlmutter's attorneys, Schiller, Du Canto and Fleck and Stephen Katz, timely filed petitions for fees as sanctions; Katz later amended his petition (C. 2861, 2883, 3009).

The hearing on the petitions for attorneys' fees opened on February 4, 1991 with counsel for Mr. Perlmutter, Don Reuben, stipulating that the affidavits filed by Mrs. Perlmutter's former counsel would stand as their direct testimony; he then waived cross-examination (Resp. App. 3a). He also agreed that the petitions filed by Mrs. Perlmutter's present counsel would stand as their testimony (Resp. App. 4a). When Mrs. Perlmutter's counsel and the court confirmed that the next step would be cross-examination by Reuben, he agreed and went on to waive cross-examination of Donald Schiller, of the Schiller firm (Resp. App. 4a).

The hearing proceeded; Reuben conducted very little cross-examination, most of it focused on the correlation between the information on the contemporaneously-recorded time slips and the conduct for which fees were being sought. Arnold Stein of the Schiller firm explained the process by which the time attributable to the claimed misconduct had been extrapolated from the recorded time slips: first the specific conduct was identified; then the references to the conduct, to the ensuing strategy conferences, and to the resulting pleadings were located on each attorneys' time slips; and finally the extrapolated time entries and resulting fees were organized into the fee petition (Resp. App. 4a-5a).

During closing argument, Mrs. Perlmutter's attorneys summed up what their evidence had shown. Katz reviewed his activities in connection with Mr. Perlmutter's Change of Venue Motion, which had already been held to be the subject of sanctions, as well as Mr. Perlmutter's actions in preventing Mrs. Perlmutter from using their vacation home in Colorado (R. 5464-69). Stein described in detail each of the various incidents that constituted a sanctionable course of conduct by Mr. Perlmutter and his attorneys during discovery (R. 5473-91).

Reuben's closing argument, however, attacked the Katz and

Schiller petitions because the attorneys had not presented specific, discrete time sheets as backup to their extrapolated entries (R. 5493). Further, he argued, if the attorneys and the court had found the conduct of Mr. Perlmutter's counsel so reprehensible, under the authority of *In re Himmel,* 12 Ill. 2d 531, 533 N.E. 2d 790 (1988), they were obligated to report that conduct to the Illinois Attorney Registration and Disciplinary Commission (R. 5495). Finally, because Mrs. Perlmutter's attorneys had failed to supplement their petition with testimony, any award would be a "fraud for lack of any predicate on the time" (R. 5495). He also attacked the previous findings of sanctionable conduct concerning the change of venue motion and the petition concerning the parties' children — the first on the same basis of deficient time entries, the second on the basis that the child did need psychiatric care (R. 5501-2).

In response, Stein reminded the court of the procedure that had been agreed upon at the beginning of the hearing, and he then proposed to use his closing argument to go through every time slip and connect it to the entries on the petition (Resp. App. 5a-6a).

At this point, the court stopped the argument, clarified what its expectations had been regarding the progress of the hearing, noted that its expectation was apparently not the same as Reuben's, declared a mistrial, and concluded by saying that the fee hearing would start over again the next day (Resp. App. 6a).

When the hearing reconvened on February 5, 1991, the court amplified its reasons for declaring the mistrial (Resp. App. 7a). The hearing then proceeded; Stein testified to every act of Mr. Perlmutter or his attorneys deemed sanctionable, and he identified the hours spent dealing with the conduct by means of several exhibits — the Fee Petition, the original time records, the pleadings and orders that dealt with the various acts of sanctionable conduct, and a document that summarized the total time expended on each type of conduct deemed abusive.

Following the conclusion of the hearing, the court issued its findings and ruled that sanctions were appropriate for Mr. Perlmutter's two-count motion for change of venue to a different county, since inadequate investigation had been done on one count, and subsequent events proved the other count to have been frivolous (App. 78). Mr. Perlmutter also was found to have improperly by-passed the procedures set forth in the Joint Parenting Agreement for dealing with the children's custody and psychiatric care (App. 78); because these were emotional issues important to the parties, Mr. Perlmutter's action improperly caused great risk to the custody arrangement (App. 79).

As to the discovery abuses, the court granted fees as the sanction for seven actions or groups of actions related to the discovery process (App. 80), all of which had been fully described in pleadings filed contemporaneously with the activity (C. 900, 1066, 1077, 1276, 1370, 1386, 1892, 1954, 2010, 2042, 2107, 2278, 2337) as well as in Stein's testimony, and for which specific time had been extrapolated from the time slips (C. 2861). Fees were also awarded to Katz for his work concerning Mr. Perlmutter's refusal to obey a court order to pay Mrs. Perlmutter's condominium rental cost for one week in Aspen, Colorado at Christmas (App. 80-81).

After the entry of judgment in the sanctions proceeding, Mr. Perlmutter filed an appeal. At no point prior to his initial Appellant's Brief did he claim bias or prejudice on the part of the trial court, and the Appellate Court of Illinois held that he had waived the issue of trial court bias or prejudice by failing to raise it in a timely manner. Further, not until his Petition for Rehearing to the Appellate Court did he mention the words "Constitution" or "due process rights" in connection with his allegations of bias and prejudice on the part of the trial court; the Appellate Court refused to reconsider its decision. When the Illinois Supreme Court twice denied Mr. Perlmutter's request that it review his case (App. 31, 32), he filed his Petition for Writ of Certiorari before this Court.

REASONS FOR DENYING THE WRIT

I.

THIS MATRIMONIAL CASE PRESENTS NO SPECIAL OR IMPORTANT REASON FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

Rule 10 of this Court, which sets forth the character of reasons for which review of a federal or state court decision might be granted, states in paragraph (c) that one such reason occurs "[w]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

Contrary to the statements contained in Section I of Mr. Perlmutter's Petition, absolutely nothing in this case warrants any further review. The state court did not decide some important, virgin question of federal law needing to be settled by this Court, nor has a state court decided a federal question in a way that conflicts with other decisions of this Court. In fact, Mr. Perlmutter did not conclude that his case even raised a so-called "federal question" until after publication of the appellate court's opinion; all he had previously argued was that the trial judge's rulings sanctioning him for various behaviors proved that she was biased against him, and he did not raise that issue until his initial Appellant's Brief.

Despite petitioner's arguments in Section I of his Petition concerning the litigation explosion, the inexperience (and presumably faulty decisions) of new judges, the peculiarly intimate nature of divorce cases, and the impact that decisions in such cases have on society, all that actually occurred in the present

case is that one party was intensely unhappy with the result, the Appellate Court of Illinois reversed and remanded essentially only one issue, and the Illinois Supreme Court did not judge the case significant enough to warrant further review.

II.

THE PETITIONER HAS WAIVED REVIEW OF THE ISSUE OF JUDICIAL BIAS AND PREJUDICE DEPRIVING HIM OF SOME DUE PROCESS RIGHT BY FAILING TO RAISE THE ISSUE IN A TIMELY FASHION.

The foundation of Norman Perlmutter's argument to this Court — and the sole legal basis for his petition — is that he was deprived of his constitutional rights of due process by being forced to try his case before a judge whose bias and prejudice against him did not emerge until the entire trial and post-judgment proceedings were concluded, when he no longer had a "meaningful opportunity" to raise the issue.

In response to Mr. Perlmutter's raising the issue in his appeal to the Appellate Court of Illinois, Mrs. Perlmutter argued and the court agreed that his failure to raise the issue of judicial bias and prejudice until his Appellant's Brief constituted a waiver of the argument; his argument that all of the evidence of so-called bias occurred after the judgment was entered was not true (App. 26), and he had not taken advantage of any available opportunity to petition for a new trial or request a change of venue during or after the post-judgment proceedings (App. 26-7) during which the court's bias "emerged", either of which would have preserved the issue for appeal. His counsel never mentioned the concept of bias and prejudice, much less a due process deprivation. Finally, during the entire two days of hearing on Mrs. Perlmutter's request for fees as a sanction for various actions by Mr. Perlmutter and his attorneys over the three-year pendency of the case, the very

hearing during which Mr. Perlmutter now argues the court's bias became apparent, his counsel never once mentioned the concept of bias and prejudice, much less a due process deprivation.

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it . . . While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts . . .

Yakus v. United States, 321 U.S. 414, 444-45, 64 S. Ct. 660 (1944). Because even fundamental constitutional rights may be waived if not initially asserted, *see Henry v. State of Mississippi*, 379 U.S. 443, 85 S. Ct. 564 (1965), "[A]ny personal hardship that petitioners suffer they must be considered to have brought upon themselves." *Litchter v. United States*, 334 U.S. 742, 789-93, 68 S. Ct. 1294 (1948), as cited in *Presque Isle TV Company v. United States*, 387 F.2d 502, 506 (1st Cir. 1967).

Mr. Perlmutter attempts to cure this defect by arguing that "the evidence of the trial court's bias and prejudice only became *unambiguously* apparent at the very conclusion of all trial court proceedings and could not in good faith have been raised any earlier" (Petition, p. 6, n. 5, emphasis added). Because Section 2-1203 of the Illinois Code of Civil Procedure (Ill. Rev. Stat. 1989, ch. 110, § 2-1203, "Motions After Judgment in Non-Jury Cases"), has been held not to be mandatory for purposes of preserving issues for appeal (unlike the application of its counterpart in jury cases, § 2-1202), Mr. Perlmutter contended before the Illinois Appellate Court that he was not required to file such a motion (App. 25) even though it would have been an obvious opportunity to bring the

issue before the trial court. Neither did he move for a change of venue on grounds of judicial prejudice, which, even if filed at the conclusion of all proceedings, would have preserved the issue for review.

The principle that allegations of judicial bias, to be preserved, must be raised "at the earliest practical moment after prejudice is discovered", *In re Marriage of Kozloff*, 101 Ill. 2d 526, 532, 463 N.E. 2d 719 (1984), is not abrogated simply because a litigant claims he did not discover the prejudice until all the proceedings were concluded. If a post-trial motion under Ill. Rev. Stat. 1989, ch. 110, § 2-1203 was Mr. Perlmutter's last opportunity to raise a claim of prejudice before the trial court, he cannot excuse his failure to do so by resorting to the argument that, under Supreme Court Rule 366(b)(3)(ii), such motions are discretionary; "That rule provides that *issues which have been considered* by the trial court in a non-jury case need not be included or specified in any post-trial motion to be preserved for appeal . . ." *Page v. Estate of Page*, 66 Ill. App. 3d 214, 383 N.E. 2d 615, 618 (1978) (emphasis added). Therefore, if the trial court has been given no opportunity to rule on a given issue, either by objection during trial or by post-trial motion, a reviewing court will not consider the issue. Such is the case here.

III.

THE TRIAL COURT'S RULINGS AT THE END OF THE CASE DISPLAYED NO EMERGENT BIAS AND PREJUDICE.

The heart of Norman Perlmutter's Petition to this Court consists of his listing several alleged actions taken by the trial court that he believes demonstrate prejudice and bias. His characterization of those actions is most charitably described as wildly inaccurate.

First, the trial court never "gratuitously" invited sanction proceedings against Mr. Perlmutter. Its statement on September 11, 1990 that "there may be some arguments why there should be some contribution because of specific issues that [the Schiller firm] raise[d] in [its] motion" confirms that Schiller's request for sanction fees was already before the court prior to entry of the dissolution judgment; paragraph 4 of Schiller's Motion for Clarification listed several discovery abuses for which it sought fees, including non-production of documents, Supreme Court Rule 220 problems with disclosure of experts and their opinions, and misrepresentations concerning the development of property in Colorado (C. 2795).

Further, the court's statement was not made in isolation, as Mr. Perlmutter would have this Court believe, but in the context of a prolonged discussion between the court and all counsel about fee petitions, since the court had omitted any mention of fees in its letter opinion (Resp. App. 1a). Given the obvious fact of the already existing Schiller petition, under no reasonable interpretation of language can the Court's statement in context be described as a "s*ua sponte* solicit[ation of] a petition for sanctions against the petitioner" (Petition, p. 3).

Second, the court never "*sua sponte* order[ed] that prejudgment interest on a $2,415,000 cash award against petitioner begin to accrue immediately." (Petition, p. 11). The interest that was ordered was *post*-judgment interest, authorized by Ill. Rev. Stat. 1989, ch. 110, § 2-1303 (Resp. App. 12a) to accrue on all final judgments. Under Illinois law, such post-judgment interest accrues from the date of judgment even if the Appellate Court lowers the award on a subsequent appeal. *Phelps v. O'Malley*, 187 Ill. App. 3d 150, 543 N.E. 2d 311, *appeal denied*, 128 Ill. 2d 671, 548 N.E. 2d 1077 (1989).

Mr. Perlmutter also claims that although the trial court's

actions during the first fee hearing created insufficient justification for a charge of bias or prejudice against him, it *sua sponte* ordered a mistrial to permit the respondent to cure fatal flaws in her proof; in the second and *de novo* sanction hearing, the court admitted into evidence, over objection, an allegedly "spurious self-serving document prepared by Mrs. Perlmutter's attorneys for the hearing . . . to cure the defect in [her] proof" (Petition, p. 12). However, Mr. Perlmutter's description of the trial court event bears no relationship to the actual occurrences, as shown by the Report of Proceedings (Resp. App. 3a).

The cause of the court's declaring a mistrial was Reuben's failure to comply with the stipulation he had made to the court at the beginning of the hearing; he had stipulated that he would accept the affidavits and fee petitions of Mrs. Perlmutter's counsel as their direct testimony (Resp. App. 3a), and he then agreed with the conclusion by both the court and counsel that he would conduct whatever cross-examination he desired in order to test the support for their requests.

Instead, Reuben refrained from any cross-examination on the issue of the claimed sanctionable conduct but questioned Katz and Stein solely on their record keeping. When in closing argument he claimed that the petitions and affidavits were insufficient to support a fee award as a matter of law, and that Mrs. Perlmutter's counsel had fatally failed to amplify their petition with direct testimony, the judge declared a mistrial because she and Mrs. Perlmutter's counsel had been misled by Reuben's stipulation (App. 123); in addition, Reuben had mounted no challenge to the characterization of any specific event as one warranting a sanction. Therefore, the trial *de novo* allowed *both* parties the opportunity to cure any defects in their presentation. Only after allowing both parties to re-present their evidence and hearing argument of counsel did the court render any decision on the issues.

Kaiser v. MEPC American Properties, Inc., 164 Ill. App. 3d 978, 518 N.E. 2d 424, 427 (1987), currently the definitive Illinois case on the issue of attorneys' fee petitions, held that a petition for fees must specify the services performed, the time expended on the services, and the hourly rate charged. Both the Schiller and Katz petitions present that information (C. 2861, 3009). In addition, the same judge had presided over all the interim court appearances and hearings, and knew the events as they unfolded. Under Illinois law, a court may rely on its own knowledge and experience in determining the fee to be awarded. *In re Marriage of Orlando*, 218 Ill. App. 3d 312, 577 N.E. 2d (1991).

Neither was there bias or prejudice in the court's admission into evidence of the exhibit setting the fee summary prepared by Mrs. Perlmutter's counsel; far from being a "spurious self-serving document" as charged, such a summary, if prepared by a witness competent to testify to the underlying documents, as it was here, is readily admissible in Illinois as long as the underlying documents have been made available for inspection. *In re Marriage of Kaplan*, 149 Ill. App. 3d 23, 30, 500 N.E. 2d 612 (1986).

Mr. Perlmutter next alleges as proof of bias the "inordinately large number of sanctions against petitioner (eleven)" and the "lack of definitive findings or description as to the particular acts being condemned and punished by the court" (Petition, p. 12). As noted earlier in this Brief in Opposition, for years Mrs. Perlmutter's attorneys had been filing detailed motions and appearing in court to document numerous acts by Mr. Perlmutter that violated the rules of discovery or exceeded the bounds of advocacy. All the Schiller fee petition did was group the sanctionable activity according to the particular rule violated, an organization the court followed when drafting its letter opinion.

Sanctions were also appropriate for all the fees incurred by Mrs. Perlmutter for the spurious motion seeking a change of venue

to a different county. While the court initially decided that the *forum non conveniens* claim was warranted by law (as the contract claim was not), Mr. Perlmutter's actions proved that his actual claim of inconvenience was frivolous (App. 78); accordingly, fees were properly due for the entire venue proceeding. Similarly sound was the award of fees as a sanction for the Aspen condo rental situation, not for "questioning the fairness and propriety" of Mrs. Perlmutter's lease arrangements, but for Mr. Perlmutter's violating a court order (*see* C. 1291) directing him to pay the one-week rental cost for Mrs. Perlmutter's Aspen, Colorado vacation over the Christmas holiday. Finally, the court imposed sanctions on Mr. Perlmutter for seeking a court order for psychiatric treatment of the parties' son — not for requesting the treatment, but for refusing to utilize the consultation and mediation procedures contained in the parties' Joint Parenting Agreement, entered as an agreed order in 1988 (C. 578).

A trial judge is not relegated to being a mere referee who rules on specific issues presented at trial; he or she has a duty to control all the proceedings to the extent necessary to grant both parties a fair trial. *City of Danville v. Frazier*, 108 Ill. App. 2d 477, 248 N.E. 2d 129 (1969).

Obviously, the attorneys' fees Mr. Perlmutter was ordered to pay as sanctions for various abusive actions were not evidence of judicial bias and prejudice, but merely appropriate recompense to Mrs. Perlmutter's counsel for the hours spent in dealing with abusive tactics purposely chosen by Mr. Perlmutter and his attorneys. Such fees were justified even under Ill. Rev. Stat. 1989, ch. 40, § 508, Illinois' basic fee-shifting statute in matrimonial law cases. *In re Marriage of Ziemer*, 189 Ill. App. 3d 966, 546 N.E. 2d 229 (1989); *In re Marriage of Cotton*, 103 Ill. 2d 346, 469 N.E. 2d 1077 (1984); *Kuhns v. Kuhns*, 7 Ill. App. 3d 884, 288 N.E. 2d 884, 886 (1972). Consequently, even the Katz petition, which was initially brought under § 508 but later amended, appropriately

sought fees for conduct by Mr. Perlmutter that precipitated otherwise unnecessary court proceedings.

By now, nothing should be more clear than the baseless nature of Mr. Perlmutter's claims before this Court, claims that he cannot support except by serious misrepresentations of the facts of the case.

IV.

NORMAN PERLMUTTER'S CLAIM OF TRIAL COURT BIAS AND PREJUDICE IS NOTHING MORE THAN DISSATISFACTION WITH THE FINAL RESULT IN THE CASE.

It is axiomatic that entry of an adverse judgment, standing alone, is not evidence of prejudice on the part of a trial judge. *Nehring v. First National Bank in DeKalb*, 143 Ill. App. 3d 791, 493 N.E. 2d 1119 (1986). Mere allegations that a judge has made erroneous rulings against a party are not allegations of personal prejudice sufficient to support a motion for change of venue; neither is the fact that a judge's mind is closed on a point of law. *Palmisano v. Connell*, 179 Ill. App. 3d 1089, 534 N.E. 2d 1243 (1989).

In *United States v. Antonelli*, 582 F. Supp. 880, 881 (N.D. Ill. 1984), statements by a judge during a hearing that the defendant was the "most viciously antisocial person who has ever come before me," or that "society has been too lenient with you up to this point," were not grounds for disqualification of the judge on grounds of prejudice. Even a trial judge's post-trial comment that the defendant "is a no-good, cold-blooded killer that doesn't deserve to live" did not indicate that the judge was predisposed against the defendant during trial. *People v. Davis*, 95 Ill. 2d 1, 447 N.E. 2d 353, *cert. denied, Davis v. Illinois*, 464 U.S 1001, 104 S.

Ct. 507, *reh. denied*, 465 U.S. 1014, 104 S. Ct. 1017 (1983). Finally, if the judge *In re T.B., a Minor*, 195 Ill. App. 3d 919, 552 N.E. 2d 1107 (1990), who admonished the State to file a petition to terminate the Respondent's parental rights, was not found to be biased against the Respondent, how much less cause is there for Mr. Perlmutter to complain about the trial court's statement that it would consider all fees at one time, but that it expected the parties primarily to obviously bear their own responsibility for fees except for some arguable contribution for specific issues raised concerning discovery or other pre-trial actions (App. 120).

CONCLUSION

Ultimately, Mr. Perlmutter's Petition to this Court should be denied, not only for the obvious reason that he did have sufficient "meaningful" opportunity to raise the issue of judicial prejudice to the trial court, but also, and more fundamentally, because none of the so-called prejudiced behavior on the part of the trial court came close to qualifying as evidence of judicial bias. When the events of the trial and post-trial proceedings are viewed, not in the lurid colors Mr. Perlmutter tried to paint but as they actually occurred, the writ should be summarily denied.

Respectfully submitted,

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APPENDIX A —EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

Proceedings of September 11, 1990

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[5166] MR. SCHILLER: We have our own motion, for clarification, that we served on counsel today, that deals with the subject of attorneys' fees that was not covered in your opinion. We only provided in the judgment that should the parties wish to file a petition for attorneys' fees [5167] that they have 28 days to file such a petition . . .

* * *

[5170] MR. REUBEN: . . . On the attorney's fees, I understood by the court's silence and opinion it was intended, and I think originally [you] . . . intended to have both sides, each pay their own fees because in the first decree, formal decree sent to us it was silent on that. And it was — that's something I think people would not overlook, and it's [sic] now been raised at a very late date.

Again, however, the better — I think it — I correctly read the court's opinion of August, but you're a better expert of what your opinion is intended to do than anybody in the courtroom . . ."

* * *

[5212] MR. SCHILLER: We have now finished with everything other than the attorneys' fees which has come up.

THE COURT: I did not address the attorneys' fees in my letter. To a certain extent it was my desire not to address that issue

while I was dealing with all of the other complicated issues. Although, you all say that is something that could not possibly be overlooked, it was to some extent overlooked by me purposefully because I knew you wouldn't overlook it, and you would bring it to my attention and we would cover it. Therefore, you're given leave to file whatever petitions you wish with regard to whatever attorney's fees.

MR. JONES [Mrs. Perlmutter's prior attorney]: My petition — we have had a petition for fees [filed] since February of 1989 directed specifically against Norman Perlmutter and/or his counsel, and I would like some clarification as to how that particular subject is to be [5213] addressed.

THE COURT: How would you like to be addressed?

MR. JONES: If you're going to deal with that, you're dealing with the various petitions for fees, if that is your pleasure, that is — I could accept that, I want some specific ruling that is indeed what is going to take place.

MR. REUBEN: The thing — the Court's order was all fees be considered at one time.

THE COURT: That would be my intention. I would also sort of gratuitously say that I would expect that the parties would primarily bear their own responsiblity for fees, but I think there may be some arguments why there should be some contribution because of specific issues that you raise in your motion, for example, on discovery or whatever other reasons why they should be.

MR. REUBEN: This judgment is not final, as I understand the law.

THE COURT: That's right.

MR. REUBEN: We have raised —

THE COURT: I think that it is final for the purpose of computing the interest.

MR. SCHILLER: It's not appealable, but it's final. . . .

* * *

Proceedings of February 4, 1991

* * *

[R. 5426] MR. REUBEN: I have a statement.

MR. REUBEN: This late, as you know, in terms of this case, it's been a year — for a year. I would like to shorten it as much as possible. To that end, Mr. Stein [an attorney of the firm Schiller, Du Canto and Fleck] tendered to me today and tendered, I believe on Thursday or Friday affidavits [setting forth the attorney time spent on specified issues, taken from time slips] by [Kathryn Perlmutter's two prior attorneys] which set forth the information that they have and ask us to stipulate in lieu of their testifying. I would then, obviously, waive cross-examination. I'm prepared to stipulate as to those two gentlemen. That if they were put on the stand what their affidavit said that was sent to me was what they would testify to, and I'm prepared to waive my cross-examination of them.

I am also prepared in terms of the petitions [R. 5427] of both gentlemen, that is, the four gentlemen, Mr. Stein, Mr. Daw, Mr. Schiller [all of Schiller, Du Canto and Fleck] and Mr. Katz, they're all gentlemen. They all have petitions. I've prepared to agree — I

don't like to see lawyers on the stand very much — if they were called to the stand what is contained in their petition would be what they would testify to in order to shorten this proceeding. They want to amplify it or whatever they want to do, I'm prepared to agree, and then none of this that has to be repeated if that is agreeable with the Court.

THE COURT: Fine with me.

MR. KATZ: Fine with me. I assume then I would take the stand to be cross-examined?

THE COURT: Right. That is what I would expect. Is that correct?

MR. REUBEN: Yes, ma'am, but when it comes to Mr. Schiller, I see he is not here, I'll waive my cross examination of Mr. Schiller. He doesn't have to come.

MR. STEIN: Fine. I'm sure he'll be glad to know that. We have time set for tomorrow.

* * *

[5438] MR. STEIN: It was our understanding based on the court's ruling on our motion for clarification that the primary responsibility for the payment of attorneys' fees would fall on the respective parties themselves with certain exceptions, or certain possible exceptions, those being issues where the court had previously found sanctionable activity to exist, or a reservation for future hearing on sanctions. And, secondly, where the lawyers felt that there may have been abuses of discovery during the pendency of the case. We attempted to isolate and identify those issues where we felt that specific abuses of discovery had occurred. They're

more specifically delineated and identified in our petition. If you want me to go through them, I can.

Q. [MR. REUBEN]: No, No, I don't think we're meeting —

A. [MR. STEIN]: Well, you asked me how. I want to explain how [we] did it.

Q. [MR. REUBEN]: Did you look at all the time sheets to extrapolate that out?

A. [MR. STEIN]: Once we identified the issues, we then went to the time records themselves and pulled from the time records those entries which we felt corresponded to the particular issue upon which we thought an abuse of [R. 5439] discovery had taken place.

* * *

[5507] MR. STEIN: I didn't know exactly how the court wanted us to proceed with this petition. One of the things that preliminarily the court suggested and we accepted was that we would stand on our petition, and not go into each and every allegation and match time slips to the allegations themselves, but merely submit ourselves to cross examination.

During direct — during redirect, I believe Mr. Daw asked me if, in fact, the time records that are attached as an exhibit accurately reflect the time we expended on those issues, and they do. I said that they did.

In preparation for our direct testimony — I have no problems in sharing this with the court — we took our exhibit. The only reason we didn't do that is the court asked us to stand on the exhibit

itself rather than go through line by line.

[R. 5508]: MR. REUBEN: I'll object. The court never asked you to stand on the exhibit. I suggested and you agreed to doing that. Now he's trying to open — reopen the case and put in an exhibit that I have never seen that he wants to share with the court.

* * *

[MR. STEIN] Proofs are closed. My closing reply is not. And I'll offer to do it either as an exhibit, or I'll, in my reply, respond to Mr. Reuben's allegation and go through each and every one and tell you what each time [R. 5509] slips [sic] relates to in terms of the issue as enunciated in the pleading.

MR. REUBEN: I'll object — He should have done that by testimony. That was — he's trying to enhance his time sheets which are deficient in closing argument. When I pointed out — and trying to enhance today a contemporaneous record of two — one year ago. If the court let's [sic] him, I have no way of stopping, just make my record. I have no way of dealing with that now. He was on the stand. He could have had all sorts of opportunities to do so. He had to do — his petition should have done so. Wasn't done. He's going to do it at this late hour or attempt to do it by closing argument. Getting back. I don't know how. It's improper.

THE COURT: . . . Apparently, there were expectations as to what was going to be relied upon with regard to the affidavit and how it would relate to the petition. And my expectation was that on cross examination if you had some questions about how the time was related to their petition, then you could have an opportunity to go into it. If that expectation was not the same expectation as you had, then we'll start again tomorrow, and I'll declare a mistrial on the petition for [R. 5510] attorneys' fees.

MR. REUBEN: Well, I would like to respond. I think your Honor, that I am entitled, if the proof is defective, not to cross examine and open it up.

THE COURT: I'm declaring a mistrial. We'll start again tommorrow.

Proceedings of February 5, 1991

[R. 5534] THE COURT: . . . Now that's why we're starting over again. Because there have been allegations also of some sharp practices and I think that would maybe be the kindest way I could describe some of what went on in this case. And I don't think that should go unnoticed by the court. And that is why I'm conducting this hearing.

Now, I want to know what happened, why you [5535] think that conduct was conduct that should be — have sanctions assessed. That should be the first level of inquiry. And then the second level should be what fees were generated by that conduct.

* * *

MR. REUBEN: I simply want to state for the record that I believe that the law is that when your Honor imposes sanctions, which is a penalty, that there must be the burden on the people seeking the sanctions to prove their case by clear and convincing evidence.

And that if they don't do so, it is not my obligation to anybody, especially my client, to try to enhance the failure of proof or make their case for them.

THE COURT: I accept your position, Mr. Reuben. And to a certain extent I think you have a valid point.

MR. REUBEN: Thank you.

THE COURT: But I think where my displeasure yesterday came in was from the fact that — maybe I'm going to be repeating myself — but there have been allegations [5536] of practices that I think the court needs to take some notice of. And it's not merely to compensate Mrs. Perlmutter for the additional attorneys' fees that she may have had to expend, but it's for the administration of the system and the way lawyers conduct themselves in this court. And some very serious allegations have been made and I want to have this investigated. So it's beyond just sanctions for recompensing Mrs. Perlmutter.

MR. REUBEN: Your Honor, I couldn't agree with you more, what has been said about the lawyers who represent Mr. Perlmutter. I have practiced law 39 years and I have never been accused of the kind of things that I have been accused of — have been made the subject of accusations in this courtroom. And I'm delighted to stand on the record. I simply think that people make such accusations and claims there was a continuing course of conduct. They should have kept their records. And they should not have had the perfunctory hearing that they had yesterday. And their charging the lawyers — your Honor, has previously held in this case, and I disagree with you — that she has no jurisdiction over the lawyer's conduct in terms of a license and what have you. You recall that. I don't agree with that. I think that this does impact on all of our licenses on this side of the table. I think what is [5537] happening is very serious in terms of the charges, and I think it's unfortunate that it's taken this long for this matter to come before the court since the entry of the orders in September adjudicating the rights of the parties. But so be it. And as the record shows this is a hearing that was requested by the Court. And I'm — deeply conscious and sensitive to the issues that are being presented here by these parties. And it impacts on my license, Mr. Feiwell's

license, Mr. White's license, and Mr. Starkopf's license, indeed, Mr. Pedersen and Mr. Janser's licenses. I want the court to know I don't take it lightly at all.

MR. DAW: Judge, there is an attempt being made that were you to grant fees in this action for these reasons their position is you then have to turn them into the A.R.D.C. and take their license away from them, et cetera. That's what they're really trying to threaten you with.

THE COURT: I heard that also. And that was another source of displeasure for me yesterday. That somehow it would be better for me if I were not to find their [sic] to be reprehensible conduct, however you want to describe it, because if I were to find that kind of conduct, then I might find myself in a Himmell situation. [5538] I thought that to be an inappropriate argument.

MR. REUBEN: I don't think I said that. I think I'll stand by the record as to what I said your Honor.

MR. DAW: This petition, to make the record crystal clear, is pursuant to what we claim to be discovery pursuant to section 219, [Resp. App. 18a] pursuant to the orders, all of the entered sanctions relative to 2 — 611 [Resp. App. 11a] on the venue issue, relative to conduct bringing Harry back into these proceedings without the benefit of mediation. The whole issue involving Mr. Doherty. The disclosure of alleged confidential information that our experts and that we had been seeking for approximately 14 months, that they had, in turn, surrendered to their experts. Those are the issues. That is not one which means that the court or the attorneys are required to tender Mr. Reuben, Mr. Feiwell, Mr. Starkopf, Mr. Starkman, Mr. Harvey, Mr. White, Mr. White from Chicago, to the A.R.D.C. that is what they want it to be, but it's not. This is a case of over

zealousness. Over zealousness. Taking advantage of the situation, making misrepresentations of fact and law to the court and taking totally contrary positions which was totally abuse of the discovery process. They came into the court repeatedly and said, judge, look how magnanimous we're being. We're giving them thousands of documents, and gave you a big list. What they didn't tell you is if we didn't know exactly the document we were looking for, or the exact subject matter, they weren't going to help us. So we sat in rooms full of boxes full of documents trying to find the one specific document . . ."

APPENDIX B — RELEVANT STATUTES & RULES

TEXT OF ILL. REV. STAT. 1989, CH. 110. § 2-611

2-611. Signing of pleadings, motions and other papers — Sanctions

§ 2-611. Signing of Pleadings, Motions and Other Papers; Sanctions. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need to be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Section, the court, upon motion or upon its own initiative, shall impose upon the person

who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

* * *

All proceedings under this Section shall be within, and part of the civil action in which the pleading, motion or other paper referred to herein has been filed, and no violation or alleged violation of this Section shall give rise to a separate cause of action, or another cause of action within the civil action in question, by, on behalf of or against any party to the civil action in question, and by, on behalf of or against any attorney or insurance company involved inthe civil action in question.

TEXT OF ILL. REV. STAT. 1989. CH. 110. § 2-1303

2-1303. Interest on Judgment

§ 2-1303. Interest on judgment. Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied or 6% per annum when the judgment debtor is a unit of local government, as defined in Section 1 of Article VII of the Constitution, a school district, a community college district, or any other

governmental entity. When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. Interest shall be computed and charged only on the unsatisfied portion of the judgment as it exists from time to time. The judgment debtor may by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of an appeal, or other steps to reverse, vacate or modify the judgment.

PARTIAL TEXT OF ILLINOIS SUPREME COURT RULES 201(a),(b),(k), 219, 220

PART E. DISCOVERY, REQUESTS FOR ADMISSION, AND PRETRIAL PROCEDURE

201. (Supreme Court Rule 201). General Discovery Provisions

(a) Discovery Methods. Information is obtainable as provided in these rules through any of the following discovery methods: depositions upon oral or written questions, written interrogatories to parties, discovery or inspection of documents or property, and physical and mental examination of persons. Duplication of discovery methods to obtain the

same information should be avoided.

(b) Scope of Discovery.

(1) *Full Disclosure Required.* Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any document or tangible things, and the identity and location of persons having knowledge of relevant facts. The word "documents," as used in these rules, includes, but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, and communications.

(2) *Privilege and Work Product.* All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. The court may apportion the cost involved in originally

securing the discoverable material, including when appropriate a reasonable attorney's fee, in such manner as is just.

* * *

(k) Reasonable Attempt to Resolve Differences Required. Every motion with respect to discovery shall incorporate a statement that after personal consultation and reasonable attempts to resolve differences the parties have been unable to reach an accord. The court may order that reasonable costs, including attorneys' fees, be assessed against a party or his attorney who unreasonably fails to facilitate discovery under this provision.

220. (Supreme Court Rule 220). Expert Witnesses

* * *

(b) Disclosure.

(1) *Expert Witness.* Where the testimony of experts is reasonably contemplated, the parties will act in good faith to seasonably:

(i) ascertain the identity of such witnesses, and

(ii) obtain from them the opinions upon which they may be requested to testify.

In order to insure fair and equitable preparation for trial by all parties the identity of an expert who is retained to render an opinion at trial on behalf of a party must be disclosed by that party either within 90 days after the substance of the expert's opinion first becomes known to that party or his counsel or, if the substance of the expert's opinion first becomes known to that party or his counsel or, if the substance of the expert's opinion is then known, at the first pretrial conference in the case, whichever is later. In any event, as to all expert witnesses not previously disclosed, the trial court, on its own motion, or on the motion of any party after the first pretrial conference, shall enter an order scheduling the dates upon which all expert witnesses, including rebuttal experts, shall be disclosed. The schedule established by the trial court will sequence the disclosure of expert witnesses in accordance with the complexities of the issues involved and the burdens of proof of the respective parties as to those issues. All dates set by the trial court shall be chosen to insure that discovery regarding such expert witnesses will be completed not later than 60 days before the date on which the trial court reasonably anticipates the trial will commence. Upon disclosure, the expert's opinion may be the subject of discovery as provided in paragraph (c) hereof. Failure to make the disclosure required by this rule or to comply

with the discovery contemplated herein will result in disqualification of the expert as a witness.

(2) *Consulting Expert.* Except as provided in paragraph (c)(5) hereof, a party need not disclose the identity of a consulting expert.

(c) Discovery.

(1) Upon interrogatory propounded for that purpose, the party retaining or employing an expert witness shall be required to state:

(i) the subject matter on which the expert is expected to testify;

(ii) his conclusions and opinions and the bases therefor; and

(iii) his qualifications.

(2) The party answering such interrogatories may respond by submitting the signed report of the expert containing the required information.

(3) A party shall be required to seasonably supplement his answers to interrogatories propounded under this rule as additional information becomes known to the party or his counsel.

(4) the provisions of paragraphs (c) and (d) hereof also apply to a party or an employee of a

party who will render an opinion within his expertise at the time of trial.

219. (Supreme Court Rule 219). Consequences of Refusal to Comply with Rules or Order Relating to Discovery or Pretrial Conferences

(a) Refusal to Answer or Comply with Request for Production. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on notice to all persons affected thereby, he may move the court for an order compelling an answer. If a party or other deponent refuses to answer any written question upon the taking of his deposition or if a party fails to answer any interrogatory served upon him, or to comply with a request for the production of documents or tangible things or inspection of real property, the proponent of the question or interrogatory or the party serving the request may on like notice move for an order compelling an answer or compliance with the request. If the court finds that the refusal or failure was without substantial justification, the court shall require the offending party or deponent, or the party whose attorney advised the conduct complained of, or either of them, to pay to the aggrieved party the amount of the reasonable expenses incurred in obtaining the

order, including reasonable attorney's fees. If the motion is denied and the court finds that the motion was made without substantial justification, the court shall require the moving party to pay to the refusing party the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

* * *

(c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably refuses to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(i) that further proceeding be stayed until the order or rule is complied with;

(ii) that the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) that he be debarred from maintaining any particular claim,

counterclaim, third-party complaint, or defense relating to that issue;

(iv) that a witness be barred from testifying concerning that issue;

(v) that, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that his action be dismissed with or without prejudice; or

(vi) that any portion of his pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue.

In lieu of or in addition to the foregoing, the court may order that the offending party or his attorney pay the reasonable expenses, including attorney's fees incurred by any party as a result of the misconduct, and by contempt proceedings compel obedience by any party or person to any subpoena issued or order entered under the rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.